



Smith, L., Hitchings, E., & Sefton, M. (2017). Fee-Charging McKenzie Friends in Private Family Law Cases: Key Findings from the Research Report. *Family Law*, 47(9), 971-977.

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# Fee-charging McKenzie Friends in private family law cases: key findings from the research report

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This article sets out the key findings from a recent qualitative mixed methods study into the practices of fee-charging McKenzie Friends in private family law cases. The full report was published by the Bar Council in June 2017.

## Background

The term 'McKenzie Friend' originates from a 1970 Court of Appeal case in which it was confirmed that LiPs have a (rebuttable) right to receive lay assistance in the course of representing themselves (*McKenzie v McKenzie* (1970) 3 WLR 472). The parameters of this lay assistance are now outlined in Practice Guidance (*McKenzie Friends: Civil and Family Courts*) [2010] 1 WR 1881. Although the traditional type of McKenzie Friend is still very much in evidence in our courts (see L Trinder et al, *Litigants in person in private family law cases*, MoJ, 2014), the reach of the title has extended to include the role of a different type of supporter, namely one who provides 'lay assistance' on a regular basis for a fee. These fee-charging, repeat player McKenzie Friends work predominantly in the area of family law, with many taking up the work following their own experience of private family proceedings.

There are suggestions that there has been an increase in the number of fee-charging McKenzie Friends seeking permission to exercise rights of audience. While there is currently nothing to prevent any person from offering general legal advice and assistance in England and Wales, rights of audience, by contrast, are a reserved activity under the Legal Services Act 2007. 'Authorised' individuals (usually lawyers) must be appropriately qualified and insured and are subject to the rules of the relevant professional regulators, under the oversight of the Legal Services Board. Unauthorised individuals, including McKenzie Friends, can be granted permission to exercise rights of audience on a case-by-case basis.

A report published by the Legal Services Consumer Panel in 2014 concluded that the risks presented by fee-charging McKenzie Friends were not great and that they ought to be accepted 'as a legitimate feature of the evolving legal services market' (LSCP, para 5.7). In spite of this, concerns remain and a recent consultation by the Lord Chief Justice sought views on a proposal that, 'the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly or indirectly in receipt of remuneration' (Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: a consultation*, 2016, pp19-21).

Thus far, however, fee-charging McKenzie Friends have been the subject of relatively little empirical research. As such there is a thin evidence base on which informed judgements about the relative weight of the threats and opportunities presented by this 'emerging market' in legal services might be built. The aim of this study was to extend and deepen knowledge and understanding of the work done by fee-charging McKenzie Friends in private family law cases, with particular emphasis on the support they provide in the courtroom and the experiences of the litigants who use them. The research explores two knowledge gaps that existing research has not addressed: first, the lack of data on the perspectives and experiences of the clients of McKenzie Friends; and secondly the dearth of information on how McKenzie Friends approach work inside the court environment.

### Research design

Stage one of the research comprised in-depth, semi-structured interviews with 20 fee-charging McKenzie Friends and 20 litigant in person (LiP) clients of McKenzie Friends. The sample of McKenzie Friends was purposively selected, based on information available online, to encompass a mix of genders, backgrounds, fees and experience levels. The sample of clients was obtained by advertising the study using social media and information distributed at courts and with the assistance of Personal Support Units and Citizens Advice.

The samples cannot be treated as representative and our study might have captured more positive than negative accounts of fee-charging McKenzie Friends' work. First, our sampling method resulted in us interviewing the more established and willing-to-engage contingent of fee-charging McKenzie Friends working in the area of family law, whilst capturing only a few of those new to fee-charging McKenzie Friend work, and therefore less experienced in it. Secondly, in relation to the client interviews, the majority who ultimately responded to our advertising were alerted to the study by fee-charging McKenzie Friends. This means that the sample of clients interviewed is likely to have a pro-McKenzie Friend leaning.

Stage two of the research involved observation of private family law hearings involving fee-charging McKenzie Friends and linked interviews with as many of those involved in the hearing as possible. One of the key methodological challenges in this study was identifying private family law cases in which fee-charging McKenzie Friends would be present and we found a range of practices between courts in the identification and registration of attendance of fee-charging McKenzie Friends. There is no system-wide mechanism for identifying in advance of a hearing whether a LiP will be assisted by a McKenzie Friend, and there might be nothing on a case file to indicate that a McKenzie Friend has been involved. The strategy we adopted was to spend a planned number of research days in family courts with high case loads and work with ushers to identify eligible cases as McKenzie Friends signed in for listed hearings upon arrival at the court.

The researchers spent a total of 34 days at five designated family courts. Out of 846 private family law cases listed on those court observation days, 14 cases were identified as involving a paid McKenzie Friend, or just under 2% of cases. Permission to observe was granted in seven cases. The research team was able to obtain 14 linked interviews. By contrast, 366 of the hearings (43%) involved a LiP. This suggests that work done by fee-charging McKenzie Friends in private family proceedings appear to constitute a relatively small proportion of the total number of hearings involving unrepresented litigants.

## About fee-charging McKenzie Friends

### Estimating the number of fee-charging McKenzie friends

It has been reported that the number of fee-charging McKenzie Friends is growing in the wake of the withdrawal of legal aid for a range of legal disputes through the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

In 2014, the LSCP suggested it was not able to quantify the numbers of fee-charging McKenzie Friends, although it referred to anecdotal evidence of increased numbers since the cuts to legal aid (para 2.5). One recent study estimated that there were between 40-50 fee-charging McKenzie Friends in operation in the legal services sector in England and Wales. (This figure was provided by the Society of Professional McKenzie Friends to the Competition and Markets Authority (CMA), Legal Services Market Study, 2016, para 4.75) On that estimate, our sample of 24 interviewees (20 freestanding interviews and four court observation linked interviews) could be taken to include around half of the total population of fee-charging McKenzie Friends. However, for several reasons, we think the figure is likely to be an underestimate.

First, we initially identified approximately 50 McKenzie Friends operating in private family cases from a range of online directories and websites identified through Google searches. However, of the 11 fee-charging McKenzie Friends we encountered at court, we had only identified three during our early search for interview participants; the others did not have an easily traceable online presence. At least one did advertise through a website, but using terminology that meant the website did not show up in searches for McKenzie Friends. Secondly, it became clear during the research that a number of McKenzie Friends operate primarily through social media and/or word-of-mouth recommendations, especially through support networks designed primarily for fathers, e.g. Families Need Fathers (FNF). Finally, as the Legal Services Board recently noted, the McKenzie Friends market 'is characterised by people entering and leaving the market, with a smaller pool of McKenzie Friends who are more established within the system.' (LSB, 2016, p12) Some fee-charging McKenzie Friends operate on a fairly casual basis, possibly for a short period of time following a personal experience with the family justice system. For these reasons we think it more likely that the number of fee-charging McKenzie friends operating at any given time in the legal services sector for England and Wales is in the region of 100 or so. On this view, our sample still represents a substantial minority (around a quarter) of fee-charging McKenzie Friends. But the important point here is that there is reason to believe that the population, while bigger than

some estimates, is in fact very small (for comparison, the number of practicing solicitors in England and Wales is currently around 136,000). (See [https://www.sra.org.uk/sra/how-we-work/reports/data/population\\_solicitors.page](https://www.sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page))

### **A typology of fee-charging McKenzie Friends**

It appears that a majority of fee-charging McKenzie Friends work in the area of private family law disputes. This is partly because there is extensive unmet need in relation to legal services in this area; the withdrawal of legal aid for such disputes precipitated a steep rise in the number of unrepresented litigants in the family courts. But there is also evidence that prior experience in the family courts has served to motivate many fee-charging McKenzie Friends to move into this area of work. This in turn prompts concerns that the work of such individuals might be agenda driven.

Our in-depth McKenzie Friend interviews provided us with detailed information on the backgrounds and motivations of those interviewed. Based on our analysis of this information, all our interviewees fell into one or more of the following categories. In an indication that the motivations of fee-charging McKenzie Friends can be rather more nuanced than is sometimes supposed, these categories proved not to be mutually exclusive – indeed, most of our interviewees could be aligned with at least two of five categories. They are listed in order of prevalence among our sample.

#### **i. The business opportunist**

Almost all the McKenzie Friends we interviewed made statements suggesting that their movement into this area of work was partly motivated by their recognition of a business opportunity. This included some who had been through the family justice process themselves and some who identified fee-charging McKenzie Friend work as an alternative path to a legal career because they were unable to complete partly undertaken legal training (for example because they could not obtain a pupillage, training contract or complete their legal executive training).

#### **ii. The redirected specialist**

Our sample included some highly-experienced former professionals (family law solicitors, a legal executive, and a family mediator) who had moved into unregulated McKenzie Friend work. Reasons for the change of professional direction included lack of family law employment opportunities, frustration at levels of unmet need in relation to family law because of affordability issues, and disillusionment with the nature of professional legal work.

#### **iii. The good Samaritan**

A ‘good Samaritan’ McKenzie Friend appeared substantially motivated by concern for the welfare and well-being of the client. Unsurprisingly, many of our interviewees made comments that suggested they were altruistically motivated. Ultimately we placed a handful of our interviewees in this category, on the basis that their espoused empathy with the needs and financial constraints of some litigants reportedly manifested itself in charging practices, e.g. if the interviewee

did some work for free or set their fees at a very low level in the interests of affordability for low income litigants.

#### **iv. The Family Justice Crusader**

Our research supports existing research that suggests that many McKenzie Friends take up the role following their 'own negative experience of courts during divorce or child contact.' (LSCP, 2014, p3 and para3.5). We also found evidence that a large number of McKenzie Friends have links with support groups and networks that are primarily aimed at fathers. However, our analysis suggested that not all those with personal experience of the legal system will become a crusader for their particular version of family 'justice'. Some simply capitalise on their experience by converting it into a business opportunity, whereas others provide services at a low fee out of a desire to support others as 'good Samaritans'. While personal experience might well be a common gateway to working as a McKenzie Friend, it does not necessarily characterise the approach to practice.

#### **v. The 'Rogue'**

We saw limited evidence of 'rogue' McKenzie Friends in this study. We did observe one case hearing involving a fee-charging McKenzie Friend whose conduct was wholly inappropriate in the context of family law proceedings, and had impacted negatively on the trajectory of the proceedings. Some of the McKenzie Friends we interviewed presented anecdotal evidence of others who behaved dishonestly, negligently or exploitatively and we also note evidence from outside the remit of the study, which suggests that a minority of fee-charging McKenzie Friends behave inappropriately and/or unscrupulously, on a scale that is likely to damage the interests of litigants or the administration of justice. (For example, the David Bright case, see <https://www.lawgazette.co.uk/law/mckenzie-friend-jailed-for-deceit-in-family-court/5058352.article>, *Re Nigel Baggailey (aka Nigel Quinlan)* [2015] EWHC 1496 (Fam), *Oyston v Ragozzino* [2015] EWHC 2322 (QB) and *R v Williamson* (unreported)). Poor behaviour on the part of McKenzie Friends is probably a minority concern but we suggest that this area of work is particularly vulnerable to exploitative opportunists, given that there is no regulatory body, no professional code or scrutiny, and potentially no set-up costs.

#### **Business practices of fee-charging McKenzie Friends**

The McKenzie Friends we interviewed utilised a range of fee structures – some charged by the hour, some a flat fee for a case or task, and some a daily rate. Headline rates were extremely variable but reported fee-charging practices are such that the overall cost of services provided to clients appears to be relatively low, even in the case of those whose rates are at the higher end of the spectrum. This impression was supported by evidence provided through our client interviews.

Some of what we heard about business practices was concerning and suggested a need for many fee-charging McKenzie Friends to pay closer attention to developing administrative procedures and business standards that are capable



of safeguarding their own and their clients' interests. The take-up of professional indemnity insurance and registration with the Information Commissioner's Office, was not widespread among those who were not members of the Society of Professional McKenzie Friends, which requires such insurance and registration. Many did not provide clear terms and conditions of service and few had clear procedures in place for complaints handling. Protection for clients of McKenzie Friends therefore appears to be patchy and limited.

Many of those we interviewed reported that they did not keep standard office hours and prided themselves on their availability and responsiveness to clients. It was clear from our interviews with clients that the friendliness, informality and accessibility of fee-charging McKenzie Friends was highly valued. However, this departure from typical professional boundaries and relationships can blur expectations for both clients and McKenzie Friends. We heard some accounts of McKenzie Friends finding themselves in difficult, potentially risky situations as a result of client demands or behaviour.

A number of McKenzie Friends involved in the research held, or were working towards, relevant qualifications and relevant training and development opportunities were reportedly sought and pursued by many others. Though this was often restricted to participation in bespoke McKenzie Friend training that is designed and delivered by individual McKenzie Friends, it is clear that many fee-charging McKenzie Friends are keen to further their knowledge and skills and willing to invest time and money in doing so.

### **The work of fee-charging McKenzie Friends**

Our data suggests that the size and shape of the 'problem' presented by fee-charging McKenzie Friends is rather different to that assumed in previous discussion and commentary. To begin with, the data from our court observations suggests that fee-charging McKenzie Friends in private family law cases remain a relatively rare occurrence. Secondly, whilst much commentary to date has reflected on the issues raised by McKenzie Friends in the courtroom, our research suggests that fee-charging McKenzie Friends undertake a wide range of tasks outside of court and, for those who took part in the study, this appears to constitute the bulk of their work, though individuals vary in terms of which tasks they perform and the extent of support provided.

Almost all the McKenzie Friends in our study appeared to give legal advice of some sort, though not all of them defined it as such. This study was not designed to measure the quality of the work done by fee-charging McKenzie Friends against any objective criteria. However, it appeared that a majority of the fee-charging McKenzie Friends we spoke to and /or observed at court had gleaned sufficient knowledge and procedural awareness from their experience, particularly in relation to child arrangements issues, to enable them to mitigate the difficulties experienced by many unassisted litigants in person. As such, some are likely to be instrumentally useful to the courts and aid the administration of justice.

There were exceptions to this general finding. A minority of those we encountered during the research demonstrated misunderstandings of the law or related questionable judgements related to the management and presentation of client cases.

There was evidence of a strong settlement orientation amongst the McKenzie Friends we spoke to. In the courtroom, most of those involved in the study restricted themselves to a 'coach' type role, helping the litigant to represent themselves and preferring not to seek rights of audience in the absence of exceptional circumstances. Where a LiP is struggling, it was reported that it is not uncommon for judges to invite McKenzie Friends to address the court. We were told that many McKenzie Friends refer clients to other family justice professionals, particularly direct access barristers, for specialist assistance when it is required and several client interviewees also suggested that this was the case. That said, in the court observation stage of the research we saw some evidence of McKenzie Friends whose active efforts to exercise rights of audience presented difficulties. For example, in one of the observed cases, considerable court time was expended discussing numerous allegations of inappropriate behaviour on the part of the McKenzie Friend – much of which concerned their conduct outside of the court environment. There was little evidence during the hearing that this McKenzie Friend accepted or even understood why their behaviour would be considered unacceptable. During the hearing, the McKenzie Friend presented as argumentative and unable to restrain themselves from being a lead actor in the proceedings.

The 'conduct of litigation' is a reserved activity under the Legal Services Act 2007, meaning that fee-charging McKenzie Friends are not normally permitted to undertake tasks that would fall under this heading. The interviews and observations conducted for this project revealed that there is potential for confusion around the scope and boundaries of the conduct of litigation and fee-charging McKenzie Friends vary in their perceptions of which tasks fall beyond the boundaries of their proper role. Policy discussions concerning McKenzie Friends are often focused on the desirability of allowing unregulated and unqualified individuals to undertake reserved activities but the discussion tends to focus on another reserved activity: the exercise of rights of audience. Given the amount of work that fee-charging McKenzie Friends report doing outside of the courtroom, the case for clarifying – and perhaps reviewing – the scope of the conduct of litigation seems more pressing than concerns about rights of audience.

The clients we interviewed were, on the whole, extremely positive about their experiences of using a McKenzie Friend. They often felt that fee-charging McKenzie Friends provide support that is distinct from what solicitors or barristers do in several key respects. Most notably, they valued the accessibility and informality of their McKenzie Friends and the sense of having a 'friend' or 'ally' in the process. They reported very high levels of trust in their McKenzie Friends and, where the McKenzie Friend had personal experience of the family justice system, this often seemed connected to a sense of affiliation that was engendered by shared experience. Many of the clients we interviewed gave



accounts that suggested the services they had purchased were far cheaper than services they had previously purchased from solicitors (almost all had used solicitors prior to contacting a McKenzie Friend).

### Thoughts for the future

Our research suggests that we should be neither completely sanguine nor extremely concerned about the work of fee-charging McKenzie Friends in the area of private family law. We do not consider that the findings support placing heavy restrictions on individuals' ability to conduct this type of work or to charge for doing so. However, there is enough that is concerning in relation to fee-charging McKenzie Friends to merit efforts to tackle the worst of the sector and a more detailed evaluation of their services than this study afforded would also be welcome. Steps could usefully be taken to provide greater consumer protections to the litigants who use fee-charging McKenzie Friends. Broader reflection on and clarification of the tasks McKenzie Friends are and are not permitted to do within the current framework of legal services regulation would also be worthwhile. In this respect, attention should focus primarily on the range and parameters of reserved tasks that fall within the 'conduct of litigation'. We suggest that fears about McKenzie Friends trespassing inappropriately and too extensively into the reserved territory of rights of audience might be allayed by changing civil and family proceedings rules so that McKenzie Friends may only address the court on the invitation of the judge.

Any interventions should heed the following caveats: first, they should be cognizant of and proportionate to the apparently very limited scale on which McKenzie Friends operate in the family courts; secondly they should account for the fact that, for many litigants in this area, the choice is between being unsupported or using a fee-charging McKenzie Friend - free support is limited and paying for lawyers throughout a case is beyond their means.

*The research reported in this article was funded by the Bar Council of England and Wales and we have been appreciative of their support throughout the project. The research team is independent and the views expressed are those of the authors and not necessarily those of the Bar Council.*

*The full research report is freely accessible at:*

*[http://www.barcouncil.org.uk/media/573023/a\\_study\\_of\\_fee-charging\\_mckenzie\\_friends.pdf](http://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf)*